No. 82-1775

IN THE

Supreme Court of the United States

October Term, 1982

BILLY G. CHAMBERS, JR., ET AL.,
Petitioners

v.

McLEAN TRUCKING COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR EASTERN CONFERENCE OF TEAMSTERS, TEAMSTERS LOCAL UNION NO. 391, TEAMSTERS JOINT COUNCIL NO. 9 and W.C. BARBEE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a Local Union, sua sponte, must file grievances on behalf of employees it represents.

2. Whether a Local Union owes a duty of fair representation to employees already represented by other local unions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (A15-A17) is unreported. The Memorandum Opinion and Order of the district court (A1-A14) is reported at 550 F. Supp. 1335.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1983. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), provides:

> §185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organziation representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Facts

Teamsters Local Union No. 391 ("Local 391") and McLean Trucking Co. ("McLean") and Spector Red Ball, Inc. ("Spector") were parties to the National Master Freight Agreement and the Carolina Freight Council City Cartage Supplemental Agreement ("the Agreement") for the period April 1, 1976 to March 31, 1979. (A4-A5). Respondents Eastern Conference of Teamsters ("the Conference"),Teamsters Joint Council No. 9 ("the Joint Council") and W. C. Barbee were not signatories to the Agreement. Petitioners represent a class of casual employees at McLean and Spector. Four other Local Unions, also signatories to the Agreement, are not parties to this case.

The Agreement contains a mandatory grievance procedure culminating in a final and binding arbitration award. Within ten

days after an alleged breach of contract, the aggrieved employee must file a grievance with his Local Union. If a grievance cannot be resolved informally, the Local Union must file for a hearing at the Carolina Bi-State Joint Committee, composed of three management and three labor representatives, none of whom are employed by parties to the dispute. If, after an evidentiary hearing, the case is deadlocked, it proceeds to the Eastern Conference Joint Area Committee, a similar bi-partite committee composed of labor and management representatives from a wider geographic area. Cases deadlocked at the Eastern Conference Joint Area Committee are submitted to the National Grievance Committee. A majority decision of either of the three committees is final and binding. (A6).

In addition to their complement of regular employees, many companies, including McLean and Spector, hired casual employees as needed for their warehouse operation. These casual employees were not covered by the contractual health and welfare provisions. In lieu of such coverage, the Agreement required employers to pay casuals $0.50 per hour above the contractual wage rate effective May 30, 1976. However, the Agreement provided that (A5):

> This payment shall not be subject to overtime, and shall not be required if the health and welfare contributions established by the Supplemental Agreement (weekly, etc.) have been paid on his behalf, or if health insurance is provided as interpreted by the National Committee.

Many of the casuals obtained health and welfare coverage through other, full-time employers. Others were covered through insurance provided their spouses. Absent an interpretation by the National Committee, many employers were uncertain of the application of this $0.50 premium. (A10). Spector paid the premium only to those casuals who specifically requested it. (A5). McLean did not pay the premium to all casuals until January 17, 1977, and then only prospectively. (A5).

Within 10 days of the May 30, 1976 effective date of the premium, Joseph Ellen, a preferential casual employee in North Carolina McLean, filed a grievance with Local 391 requesting the premium.[1] Shortly thereafter, McLean began paying the premium to its preferential casuals. (A5).

Pursuant to employee complaints, Local 391 filed grievances against Roadway Express, Branch Motor Express and Pilot Freight Carriers, Inc., alleging that the employers were not paying the premium to their casuals at specified terminals in eastern North Carolina. (A6). The Roadway grievance deadlocked at the Carolina Bi-State Committee and at the Eastern Conference Joint Area Committee. On March 10, 1977, the National Grievance Committee issued the following guidelines:

> 1. Fifty cents (50¢) per hour, up to a maximum of four dollars ($4.00) per day Health & Welfare contribution, is to be paid each part-time/casual employee who works in a job classification covered under the Virginia or Carolina Cartage Supplements.
>
> 2. An employer must determine before employing a part-time/casual employee if that employee has current Health & Welfare coverage.
>
> 3. There shall be the following exclusion to the above guidelines: No 50¢ per hour payments in lieu of Health & Welfare coverage shall be required if the part-time/casual employee in question is covered for the time worked under a Health & Welfare plan established by the Supplemental Cartage Agreement.

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[1] Preferential casuals enjoyed a status between regulars and casuals. An employer could not hire casuals without first contacting its preferential casuals.

> 4. If a part-time/casual employee has a dispute over the failure, on the part of his employer, to comply with the above, that dispute shall be subject to the grievance procedure for final determination.
>
> 5. Any dispute or grievance for Health & Welfare payments of individual part-time/casual employees should be handled using the above stated guidelines. Based on the guidelines, the employer shall pay the part-time/casual employees who filed grievances in Case No. N-3-77-E2 (Local 391 vs. Roadway).
>
> 6. Any grievance on hand/file as of March 10, 1977, should be handled using the above stated guidelines.

These guidelines were distributed to the affected employers on March 25 and posted at the terminals. Paragraph 6 of the guidelines caused some dispute. Local 391 President R. V. Durham wrote to Robert Flynn, executive assistant to the Director of the Conference and a member of the National Grievance Committee. Flynn responded in a telegram dated May 2, 1977. Flynn stated, in part, that "Any grievance that was not filed by the union and in the hands of the employer prior to March 10, 1977 will not be honored." (A6-A7). Flynn meant that the post-March 10 grievances should not be honored for more than the 10 day retroactivity period set forth in the grievance procedure. (A9, A10, n.5).

Thereafter, all grievances were resolved in accordance with the National Grievance Committee guidelines and the Flynn interpretation. On May 23, 1977, Local 391 filed a grievance on behalf of a number of named McLean casuals, including Plaintiff Chambers, seeking the premium for the period May 30, 1976 to January 17, 1977. The Carolina Bi-State Committee denied the claim on October 13, 1977. On March 8, 1977, Plaintiff Angell filed similar grievance with Local 391 on behalf of casuals at

McLean and Spector. Local 391 did not process the grievance against either company because casuals had been paid for the 10 days preceding the filing of the grievance. (A7).

In South Carolina, Teamsters Local 28 filed a grievance against Spector prior to March 10, 1977. Employees named in this grievance received payment retroactively to May 30, 1976. Local 28 filed other grievances after March 10, 1977. On November 8, 1977, the Carolina Bi-State Committee instructed Spector to pay those claims only for the 10 days prior to the filing of the complaints. (A7).

The record contains no evidence concerning casuals represented by Teamsters Local Union Nos. 61 and 71 in North Carolina and Local Union No. 509 in South Carolina. (A12).

B. The District Court's Opinion and Order

The district court concluded that the claim that the union defendants breached the duty of fair representation in the processing of the 1977 grievance against McLean "is time barred." (A8). However, the court proceeded to discuss the merits of that claim "as an alternative," along with the claim that the union defendants breached the duty of fair representation by not filing grievances against McLean and Spector before March 10, 1977, a claim which was not time-barred. (A8).

Turning to the merits, the court concluded that the National Grievance Committee's "10-day rule" was not arbitrarily imposed (A9) and that plaintiffs could not sue for breach of the duty of fair representation without first filing, or attempting to file, a grievance. (A10-A11). The court held that Local 391 was not required "to attempt exhaustion on its own initiative." (A11). Finally, the court concluded that Local 391 did not breach its duty of fair representation by failing to expand the Ellen grievance into a grievance on behalf of all casuals at McLean. (A11).

With respect to the class, the court held that plaintiffs failed to demonstrate that common questions of law and fact linked the

plaintiffs with employees represented by other local unions. The court found the record unclear concerning the actions of other local unions. Therefore, it certified a class of casual employees represented by Local 391 only and not of casual employees represented by the five local unions in North and South Carolina which were signatory to the Carolina Freight Council City Cartage Supplemental Agreement. (A11-12).

The court, therefore, granted the defendants' motions for summary judgment and dismissed the complaint.

C. The Court of Appeals

In a brief *per curiam* opinion, the court of appeals affirmed on the basis of the district court's reasoning. (A15-17).

REASONS FOR DENYING THE WRIT

I. Petitioners' Failure to Seek Certiorari on the Statute of Limitations Issue Drastically Limits the Significance of the Case

When a district court decision is based on alternate theories, it must be affirmed if either of its underlying rationales is correct. *Dandridge v. Williams*, 397 U.S. 471, 475 (1970). Here, the district court held that the North Carolina statute of limitations barred the claim that Local 391 breached its duty of fair representation in processing the 1977 grievance (A8) *and* that "[n]either Local 391 or [*sic*] another Teamsters entity breached its duty of fairly representing plaintiffs." (A11). The court of appeals affirmed on both theories.

Petitioners' failure to seek certiorari on the statute of limitations issue precludes its consideration by the Court. Rule 21.1(a) of the Court's Rules provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." *See, e.g., Namet v. United States*, 373 U.S. 179, 190 (1963). Because the petition does not mention the statute of limitations either in its discussion of the district court holding or in its "Reasons For Granting The Writ," the Court should not conclude

that the statute of limitations issue is "fairly comprised" within the issue Petitioners seek to present to the Court. This conclusion is buttressed by analysis of the issue Petitioners explicitly present: whether Local 391 breached its duty of fair representation by not filing a class grievance *sua sponte*. Petitioners clearly concede that the statute of limitations bars consideration of their claims concerning the grievance actually processed by Local 391.

Because the statute of limitations bars all claims on the grievances filed after March 10, 1977, the Court need not consider Petitioners' statement of facts and arguments concerning the National Grievance Committee guidelines and the analysis and effect thereof in the action against Local 391 for *not* filing grievances before March 10. More importantly, because the sole basis for the asserted liability of the Conference, the Joint Council and Barbee was the processing of the post March 10 grievances, certiorari as to them must be denied.[2]

II. A Local Union Need Not Sua Sponte File Grievances on Behalf of Employees it Represents

The gravemen of Petitioners' remaining claim is that Local 391 should have filed a class grievance for casual employees of Spector and McLean. Petitioners can cite no case supporting this proposition. Moreover, they concede that "a union has [no] duty *sua sponte* to invoke the grievance machinery when the union has no knowledge that an employer is not complying

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[2] If certiorari is granted against the Conference and the Joint Council, they will also argue that the Court lacks subject matter jurisdiction over them because they are not parties to the contract and have no duty of fair representation. *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211, 216-217 (3rd Cir. 1979), *cert. denied*, 444 U.S. 837. Barbee will also argue that he has no personal liability in any action against the Joint Council. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 408 (1981); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 246-249 (1962); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

with a collective bargaining agreement and no individual employee brings such noncompliance to the union's attention by filing a complaint." (Pet. at 24-25). Instead, Petitioners seek to apply or create an exception to the general rule that employees must file or attempt to file grievances before suing for breach of contract or breach of the duty of fair representation. *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

First, no court has ever compelled a union to treat an individual employee's grievance as a class grievance, and the Joseph Ellen grievance, which Petitioners claim Local 391 should have treated as the class grievance, is a particularly inappropriate vehicle to create this new principle of law. Here, Ellen, a preferential casual at McLean, filed a grievance allegedly on behalf of all casuals within 10 days of the effective date of the 50¢ premium. Shortly thereafter, McLean began paying all preferential casual employees the premium. (A5). Before the court of appeals, Petitioners conceded that Ellen and the other McLean preferential casuals "are not even members of the plaintiff class." (Reply Brief, p. 8). This concession eliminates any requirement that Local 391 treat Ellen as Petitioners' representative. Reliance upon *Deposit Guarantee National Bank v. Roper,* 445 U.S. 326 (1980); *United Air Lines v. McDonald,* 432 U.S. 385 (1977); and *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) is misplaced. Each case deals with the rights of a designated class representative under Rule 23 of the Federal Rules of Civil Procedure, not a potential grievant under a labor agreement. Because Ellen concededly was not in Petitioners' class, he was not "bought off" within the meaning of *Roper* and Petitioners cannot use his grievance to toll the statute of limitations under the rationale of *American Pipe.* Furthermore, unlike *McDonald,* Petitioners never sought to intervene in Ellen's grievance. To the contrary, no named plaintiff filed a grievance until May 23, 1977 (A7), almost one year after the preferential casuals began receiving payment (A5, n.3) and four months after McLean began paying the premium to all casuals. (A5).

Second, as the district court found, no evidence suggests that Petitioners' filing of a grievance would have been futile or that Local 391 would refuse to process their grievances. (A11). Indeed,

Local 391 did process grievances at other companies and Ellen, at McLean, received payment soon after he filed his grievance. Local 391's decision to hold further grievances in abeyance until the National Grievance Committee resolved the test cases did not excuse employees from filing grievances; had their grievances been filed by March 10, 1977, the 10 day limitation in the guidelines would not have applied. This record presents no grounds for eliminating the exhaustion requirement in *Republic Steel.*

Third, no court has held that a union violates the duty of fair representation by not sua sponte pursuing a class grievance when the adversely affected employees' silence could indicate acquiescence. Both the district court and the court of appeals carefully reviewed the extensive documentary evidence submitted by all parties and concluded that these facts did not warrant the creation of a new rule of law. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925).

In sum, this case is a particularly poor vehicle to create new principles of law and involves a complicated factual pattern unlikely to be repeated.

III. A Local Union Owes No Duty to Represent Employees Already Represented by Other Local Unions

In the guise of a Rule 23 class action question, Petitioners seek to impose upon Local 391 the duty to represent employees already represented by other Local Unions. No court has accepted this drastic expansion of the duty of fair representation. This Court should not require Local 391 to bear the burden of other Local Unions imposed by *Bowen v. United States Postal Service,* _____ U.S. _____ (1983).

Petitioners' assertions clash with the basic proposition that the duty of fair representation imposes upon the statutory representative a duty to serve the interest of all employees it represents, without hostility to any. *Steele v. Louisville & Nashville Railroad,* 323 U.S. 192 (1944). Nothing in this record would support the

conclusion that Local 391 is the statutory or recognized bargaining representative for employees in other Local Unions covered by the same contract. To the contrary, the district court found that Local 28 in South Carolina filed grievances over the same issue. (A7).

To avoid this problem, Petitioners rely upon the undisputed, but irrelevant, fact that five Local Unions each signed the same contract with the employers. However, the common contract does not supply a sufficient link in the posture of this case. Petitioners' reliance upon *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 685 (D.D.C. 1977) and *In re Itel Securities Litigation*, 89 F.R.D. 104, 122 (ND Cal. 1981) are misplaced. As those cases suggest, each employer signatory to the National Master Freight Agreement has common obligations under the contract and each employer is a member of the class in litigation testing the legality of provisions in the contract. By analogy, each Local Union signatory to the contract has certain obligations thereunder and might be a class member in similar litigation.

Petitioners here ask the Court to ignore one crucial question: to whom are the common obligations owed. *United States v. Trucking Employers, Inc., supra,* suggests that each Local Union owes a common obligation to the federal government in Title VII litigation. Conceivably, each Local Union owes a common obligation to an employer for an unlawful strike. But no case supports the proposition that each Local Union owes a duty of fair representation to employees in every other Local Union.

Petitioners might avoid this problem by seeking certifiction of separate classes: a contract-wide class against the employers[3] and a

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[3] Petitioners could then allege that non-named Local Unions breached their duty of fair representation to their own constituents. But common question of law and fact distinguish the sub-classes for each Local Union. *See, e.g., Stewart v. Winter,* 669 F.2d 328, 335 (5th Cir. 1982).

class-limited to those employees it represents against Local 391. Having failed to do so, Petitioners are bound by the class they urged before the district court. Members of the proposed class outside the jurisdiction of Local 391 simply have no right to rely upon Local 391 to process grievances on their behalf. In *Barbot v. Frachman*, 191 F. Supp. 171, 172 (S.D.N.Y. 1961), for example, the court held that members of a rival local union lacked standing to sue their former union and that their inclusion in a class was improper.

On this record, the issues presented in the petition are not worthy of resolution by the Court.

CONCLUSION

For the reasons stated herein, we urge the Court to deny the petition.

Respectfully submitted,

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